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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 97.

JOSEPHINE STIPCICH

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation.

SUPPLEMENTAL BRIEF.

CHESTER I. LONG,
GEO. E. CHAMBERLAIN,
PETER Q. NYCE,
G. C. FULTON,
Attorneys for Josephine Stipcich.

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The entire record having been ordered by the Court to be sent up, this supplemental brief is based on such record and prior briefs.

STATEMENT.

This was a suit on a life insurance policy. The case was tried to a jury and at the close of all the evidence there was a motion by defendant for a directed verdict which was sustained. Judgment was entered for Defendant for costs on July 28, 1925 (R. 51). A motion for new trial was made and overruled. A bill of exceptions was allowed (R. 114) and assign-

ments of error (R. 64) were filed. Writ of error to the Circuit Court of Appeals, Ninth Circuit, was granted (R. 63). Statement of errors upon which plaintiff in error relied was filed. (R. 121.)

From the opinion of the District Court (R. 54) and from rulings made during the trial (R. 101, 105, 111, 112 and 113), it is clear that the Court held that the insured was bound to communicate to the Company information as to his changed condition of health, notwithstanding the fact there was nothing in the policy requiring him to do so. The District Court further held that notice to Coblentz was not notice to the company (R. 105). Both of these rulings by the District Court are assigned as errors by Plaintiff in error. (R. 64 to 69 inclusive, and R. 121 to 127, inclusive.) There was no decision in the Circuit Court of Appeals for the Ninth Circuit, that court having certified the question heretofore considered by this court (R. 132).

The policy, which is printed on pages 8 to 38, inclusive, of the Record, was dated March 26, 1924 (R. 10). There is a provision (R. 38) that the policy shall not take effect unless or until the full premium has actually been paid in cash. There is a receipt (R. 38) for $212.48 signed by Coblentz on March 19, 1924. The insured died on April 8, 1924 (R. 55). Dr. Forsstrom, who operated on the insured two years before the policy was issued, was consulted by the insured about the time the application was made and Dr. Forsstrom in his examination (R. 90) said "his health had been perfect since I operated, and he didn't — he looked perfectly as well as before." Dr. Forsstrom gave him a prescription "just to aid the digestion" (R. 90), the insured having complained of a distressed feeling after eating, but the Doctor "didn't consider it very much" (R. 87, 91), but "con-

sidered that as just a little trifle" (R. 93). The doctor considered that it might be a recurrence of the former trouble, but he never mentioned that to the insured (R. 93). Doctor Sommer testified also as to the insured's condition on March 7 and 8, 1924 (R. 93), and after an examination "I advised him (the insured) that he could live a long time with it, or he might have trouble at any time. * * * It is an uncommon condition that people who have been operated on and a gastro enterostomy performed that they are not always perfectly well after an operation of that type; that is, they may have gastric symptoms; symptons of distress or symptoms of disturbances following an operation even without an ulcer being present" (R. 94, 95, 96, 97). Mrs. Stipcich testified (R. 102) "Dr. Sommer told me that my husband was in good physical condition." She also gave Doctor Sommer's statement respecting the stomach disturbance "he told me that it was something wrong; he didn't mention ulcer; he said it might be an ulcer but he didn't know. It was something, but it wasn't very much, but it might give him trouble later, or when he gets older, and he'd better go right then" (R. 103-104).

ASSIGNMENTS OF ERROR INTENDED TO BE URGED.

The plaintiff in error intends to urge the following assigned errors:

(1) In refusing to admit testimony to the effect that the agent of the company was advised of the insured's change of health. (Assignments Nos. 1, 2, 3, 4, R. 121, 122, 123.)

(2) In ruling that notice to the agent was not notice to the Company. (Assignment No. 9, R. 123.)

(3) In ruling that it was the duty of the insured to make a full disclosure of his physical condition down to the issuance of the policy. (Assignment No. 10, R. 124.)

ARGUMENT.

When There is a Conflict Between Statute and Policy.

Defendant in Error contends that the condition of health of Applicant between the date of application and delivery of the policy is material. It is not material under the provision of the policy. There are only two conditions: (a) That the full first premium has been paid to and accepted by the Company, and, (b) That this shall be during the lifetime of the Applicant. The statutes of Oregon are a part of the policy, as though written therein. Where there is a conflict between a provision in the policy and a statute, the provision in the policy is void. (National Insurance Company v. Wanberg, 260 U. S. 71; Continental Life Insurance Company vs. Chamberlain, 132 U. S. 304.)

The Policy is the Entire Contract, and All Conditions Must Be in It.

The Oregon laws, of which this Court will take judicial notice, provide that "the policy shall constitute the entire contract between the parties" (Section 6426) and "no life insurance contract or policy may be issued which does not include all conditions and provisions relating to the contract" (Section 6422). (Plaintiff's Brief, 9, 12.)

Notwithstanding the above provisions of law, the Defendant in Error wants written into the contract that "the insured must be in good health when the pre-

mium was paid and the policy delivered. The policy does not contain any such provision. It could have been put in and would have been valid. It is not unusual for life insurance policies to contain such restrictive provisions. In Northwestern Life Insurance Company v. Riggs, 203 U. S. 243, the policy contained this provision: "This policy shall not be in force until the first premium is paid and the policy delivered to and accepted by the insured *while in good health.*" In Cable vs. United States Life Insurance Company, 111 Federal 19, this was in the policy: "Upon payment of the first premium and delivery of the policy during my life time, *sound in health and in insurable condition.*" In Thompson vs. Travelers Insurance Company, 13 N. D. 444, 101 Northwestern 900, the policy contained this provision: "This policy shall not take effect unless the first premium has actually been paid *while the insured is in good health.*" The Cable and Thompson cases are both cited in the brief of the Defendant in Error.

Agent Must Be Licensed and He Represents Company in All Matters.

The law provides that the agent must be licensed at the request of the Company to do business in the State (Section 6425). (Plaintiff's in Error Brief, 11.) He is made the agent of the Company in *all* matters relating to the application and the policy, and not the agent of the Insured, and "all provisions in the application and policy to the contrary are void and of no effect whatever" (Section 6435). (Plaintiff's in Error Brief, 13). Defendant in Error contends that any statement made to or any knowledge as to facts on the part of the licensed agent Coblentz

pertaining to the Insured, were not made to or brought to the knowledge of the Company because of the stipulation in the policy (R. 28). This stipulation is in direct conflict with Section 6435 (Plaintiff's Brief, 13). Coblentz was the agent of the Company and not of the insured, in all matters relating to the application and the policy. This stipulation is an attempt to limit the agent's authority by providing that knowledge that came to him in relation to the application and the policy was not considered as having been made to or brought to the knowledge of the Company. This stipulation has, in fact, no relation to the point in controversy. It only provides that the entire contract must be stated in either Part A or B of the application. There is no attempt or purpose on the part of the Plaintiff in Error to set up a contract not included in A or B. It is the Company that is attempting to write something into the contract that is not stated in either A or B. The offer of proof in the question (R. 105), could not possibly have been contained in A and B, for it related to subsequent events.

The Stipulation Attempting to Limit Agent's Authority is Void.

There evidently was an attempt in this provision of the policy to limit Coblentz's authority by making him the agent of the applicant and not the agent of the Company in all matters relating to the application and policy. This could have been done were it not for Section 6435, which made him the agent of the Company in *all matters*. This notice of a change in health was a matter relating to the business in hand. Notice to Coblentz was notice to the Company, any provision

in the application notwithstanding, for such provision was void under Section 6435.

There was an effort made to write a provision or condition in the policy that was not in it. This could not be done under 6422 (Plaintiff's in Error Brief, 9). Where there was a provision in the policy which was forbidden by the law, it was void. The Company wants to read into the policy that he must be in good health when the policy is delivered. It is not there. The proof offered (R. 105) was material if the facts set out in Defendant's in Error evidence (R. 76 to 105) were material, for it showed notice to the Company and good faith on the part of the Applicant.

The Chamberlain and Wanberg Cases Should Have Been Followed.

We contend that Continental Life Insurance Company vs. Chamberlain and National Insurance Company vs. Wanberg, *supra*, are controlling. In the Chamberlain case, the Iowa statute was as follows: "Any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be soliciting agent of the insurance company or association issuing a policy on such application, or a renewal thereof, anything in the application or policy to the contrary notwithstanding." A provision in the policy was to the effect that the contract between the parties is completely set forth and "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated." The insured was asked whether he had any other insurance. He was not clear as to whether cooperative societies were included in

the question. The agent when advised, determined that they were not covered, and wrote "no other" insurance. The insured made a full disclosure to the agent, as was done in the instant case. This court held that by force of a statute he was the agent of the company and that the company was estopped from saying that its question as put by the agent and interpreted by him, embraced insurance in cooperative associations. This court held that the Solicitor was the agent of the Company and not of the insured, and said "by force of the statute he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company, nor could the company by any provision in the application or policy, convert him into an agent of the assured." The application contained the stipulation that if any of the answers were untrue the policy should be void. He had other insurance in a cooperative company, but he did not deceive the agent. The agent wrote the answer "no other" when he should have written "yes."

In National Insurance Company vs. Wanberg, *supra*, it was held that consent in a policy that it should not take effect until a certain general agent examined it, was void, because in conflict with a state statute that said it should take effect within 24 hours from the time the local agent took the application for hail insurance. This Court said: "It is clear that if the statute is valid, such a consent is void, because it defeats the very object of the statute." This case is cited with approval in Merchants Liability Company v. Smart, 267 U. S. 129, where this court said: "It is well settled that the business of insurance is of such a peculiar character, affects so many people and is so intimately

connected with the common good that the State creating insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs so far at least as to prevent them from committing wrongs or injustice in the exercise of their corporate functions."

Stipulation Not Applicable to Subsequent Events Here Involved.

That no statement shall be considered as made to the company unless stated in either part A or B, cannot possibly refer to the offer of evidence that was rejected. It is a provision in the application and a part of it. The evidence rejected relates to a subsequent event happening after Parts A and B had been made. It could not on that account have been included in them. If it was competent for the company to show that there was a change in the insured's condition of health after the application was made and before the policy was delivered then in all fairness and to show his good faith and that he was not guilty of fraud, his widow should be allowed to show that before the policy was delivered notice of such change was given the Company through its agent. To claim that such notice should have been stated in Parts A and B, is to require the impossible. If that was the contract it became impossible of performance and was therefore void.

The stipulation may mean:

(a) That the entire contract must be in Parts A and B and in writing. If so, it is in accord with the statute and valid but it has no relation to subsequent events, or

(b) That notice to the agent is not notice to the Company and is a limitation on his authority. If so it is void for it conflicts with the law that makes Coblentz the agent of the company in *all* matters, or

(c) That all subsequent events must be in A and B. If, so, it is impossible of performance and void, or

(d) That the notice to Coblentz must have been in writing and by him sent to the company to be notice to it. If so it is void being in conflict with Sections 6422 and 6426.

Between Two Constructions of Insurance Policy the One Most Favorable to Insured to be Taken.

In this case, it is necessary to insert words in the policy that are not there, to make it void. The Circuit Court of Appeals was evidently in doubt as to the construction to be put on the stipulation submitted with its question (R. 28, 137). Following the rule announced by this court it should have resolved the doubt in favor of the insured. It is a strained construction to apply that stipulation to events subsequent to the making of the application which could not be stated in A or B of the application. There were only two conditions subsequent to the delivery of the policy which would fix liability on the company: First, the full first premium must be paid and accepted; second, the acceptance must be during the life time of the insured. If the company wanted other conditions similar to those in Northwestern Life Insurance Company vs. Riggs, Cable vs. U. S. Life Insurance Company and Thompson vs. Travelers Insurance Company, *supra*, it should have written them into the policy. By the District Court's rulings, words were construed into the policy and application as to the good health of the insured

that were not written therein. Notice to Coblentz was construed not to be notice to the company because Coblentz was a soliciting agent only. Both of these constructions were in favor of the company on points on which the application and policy were silent. Under these circumstances the District Court should have followed the rule announced repeatedly by this court and also declared by the Supreme Court of Oregon. In National Bank vs. Insurance Company, 95 U. S. 673, this court announced the rule to be,

> "The policy having been prepared by the insurers, it should be construed most strongly against them."

In Thompson vs. Phoenix Insurance Company, 136 U. S. 297, this court said,

> "If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured."

In American Surety Company vs. Pauly, 170 U. S. 144, this court announced the reason for the rule, citing an English case:

> "'It (a life policy) is, of course, prepared by the company, and if therefore there should be any ambiguity in it, must be taken according to law most strongly against the person who prepared it.' • • • That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

In McMaster vs. New York Life Insurance Company, 183 U. S. 25, this court said,

> "If policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract."

The above rule is also approved in Oregon in Williams vs. Pacific States Fire Insurance Company, 251 Pac. 258, citing Moore vs. Aetna Life Insurance Company, 146 Pac. 151, 47 L. R. A. 1915, D 264. The rule is thus stated in the above cases,

> "It is a thoroughly settled rule in the construction of a policy of insurance, which is reasonably susceptible of two interpretations, that that meaning will be given to it which is more favorable to the insured."

By refusing to follow the above well-established rule, the District Court committed an error. Fraud was alleged in the answer on the part of the insured (R. 44, 45), but no attempt was made to prove it at the trial. The case was decided against plaintiff in error by an erroneous construction given to paragraphs 3 and 4 of the policy (R. 28).

Mutual Life Company vs. Hilton Green Not in Point.

In Mutual Life Insurance Company vs. Hilton-Green, 241 U. S. 613, cited by the Defendant in Error in its brief, the insured made representations to the agent which were untrue and which were incorporated in his application for insurance. They were also material to the risk as

they related to a physical examination when there was none, and to another application that was declined. These would have been sufficient alone to void the policy. But the question was whether the Company was estopped by the acts of the agent in making out applications containing these untruths, namely, that there was no medical examination, and the fact that the doctor for the Company signed a medical report when there was no examination. The statute of Florida was broad as to the powers of an agent. One who received money on contract of insurance was to be deemed to all intents and purposes an agent or representative of the Company. This court found for the company on the theory that the agent was not acting for it when he presented an application containing material misrepresentations under circumstances known to the applicant which negatived any probability that the actual facts would be revealed to the Company.

That case does not touch the instant case. First, the application in this case contained true statements. As to the later facts alleged to constitute a change of conditions, they were disclosed to the agent, certainly not with an idea of having him conceal them from the Company, but on the contrary, that the Company might know the facts. If there was a duty to disclose it was attempted to be carried out by the insured, and certainly the agent was not cooperating with the insured in withholding material information from the Company. The insured had reason to believe that the information would be communicated to the Company if its agent thought it necessary.

Cases Cited in Defendant's in Error Brief Not in Point as There Where No Statutes Involved Making Limitations in Policy of Agent's Authority, Void.

We admit that if it were not for the Oregon laws, the authority of agent Coblentz could have been limited as it was in New York Life Insurance Company v. Fletcher, 117 U. S. 531, cited in the defendant's in error brief. A number of cases cited by Defendant in error in its brief are cases in which the authority of the agent is limited by the policy. In Oregon the authority of the agent is made, by statute, unlimited. Defendant in error takes two positions that are inconsistent: *First*, that a new condition shall be written into the policy requiring proof of Applicant's good health at the time the policy was delivered. *Second*, that notwithstanding the Oregon law which made Coblentz the licensed agent of the company in *all matters*, yet notice to him of Applicant's condition of health after the application and before the delivery of the policy, was not notice to the Company.

Conclusion.

This case was tried upon the theory that notice to the company must be given of any change in the condition of health of the insured after the application was made and before the delivery of the policy. There is nothing in the policy requiring such notice and in Oregon the entire contract must be in the policy and it must include all conditions and provisions relating to the contract. The only conditions in this policy were that the premium must be paid and accepted during the life time of the insured. This was done.

The other theory of the District Court was that no

tice to Coblentz was not notice to the company. This also was error under the Oregon law. Coblentz was a licensed agent and there could not be and there were not any limitations on his authority. The District Court referred to him as a "soliciting agent." The statute made him the agent of the company *in all matters* relating to the application and the policy and not the agent of the insured, and "all provisions in the application and policy to the contrary are void and of no affect whatever." The District Court in directing the verdict for the defendant committed error and the case should be reversed.

Respectfully submitted,

CHESTER I. LONG,
GEORGE E. CHAMBERLAIN,
PETER Q. NYCE,
G. C. FULTON,
Attorneys for Plaintiff in Error.

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BRIEF FOR DEFENDANT IN ERROR.

F. ELDRED BOLAND,
SAMUEL KNIGHT,
Balfour Building, San Francisco,
Attorneys for Defendant in Error.

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West End Hotel & Land Co. v. American Fire Ins. Co. of N. Y., 1896, 74 Fed. 114 21

Whitley v. Piedmont & A. L. Ins. Co., 71 N. C. 480 7

Worth v. German Ins. Co., 65 Mo. App. 581 16

Wood v. Firemen's F. Ins. Co., 126 Mass. 316 26

Wyse-Thaiman, et al. v. Maryland Casualty Co. of Baltimore, 1910, 193 Fed. 55 21

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No.

JOSEPHINE STIPCICH,
Plaintiff in Error,
vs.
METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The following question and supporting facts are certified to this court by the United States Circuit Court of Appeals for the Ninth Circuit:

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Certifying a Certain Question or Proposition of Law to the Supreme Court of the United States under Section 239 of the Judicial Code.

Before Gilbert, Hunt and Rudkin, Circuit Judges.

STATEMENT OF FACTS.

This was an action on a policy of insurance on the life of one Anton Stipcich, loss, if any, payable to his wife.

On February 17, 1924, the insured made application in writing to the Metropolitan Life Insurance Company for a policy of insurance on his life. The written application signed by the applicant was divided into two parts, designated as parts A and B, and contained the following provisions, among others:

"It is understood and agreed:

"1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on part B hereof, they shall form the basis of the contract of insurance, if one be issued.

"2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company: (a) to make, modify or discharge any contract of insurance; (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder.

"3. That any statement made to or by or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application.

"4. That the Company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the Applicant."

The policy was issued pursuant to this written application on March 26, 1924.

Sections 6426 and 6435 of the Laws of Oregon provide:

"Section 6426. (1) Standard Provisions Required. From and after the first day of January next following the passage and approval of this

act no policy of life insurance other than industrial insurance, annuities and pure endowments with or without return of premiums shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state, unless the same shall contain in substance the following provisions: * * *

"(c) A provision that the policy shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non payment of premiums and except for violations of the conditions of the policy relating to naval, military or aerial service in time of war; that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties; and that no such statement or statements shall be used in defense of a claim under the policy unless contained in a written application and unless a copy of such statement or statements be indorsed upon or attached to the policy when issued."

"Section 6435. Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

In his application for insurance the applicant stated that he had been operated on for a duodenal ulcer in January, 1922, but had recovered therefrom. On the day of the application and before the application was made he consulted a physician at Astoria, Oregon, for some stomach trouble and was given a prescription. This fact was not disclosed in the application. A few days later he again consulted the same physician and was advised that an X ray should be taken. On March 7 or 8, he consulted a physician in Portland, Ore-

gon, and was sent to the hospital for observation where he remained for several days. During that period the physician made a careful examination and diagnosis of his condition and informed him that in his opinion he had a duodenal ulcer and advised surgical interference. About March 20, he consulted and was examined by a third physician at Portland, Oregon, with the like result, and the same advice was given.

All this occurred before the policy of insurance was issued or delivered. Soon thereafter an operation was performed, as recommended, and the insured died as a result of the operation. It appeared, without contradiction, from the testimony introduced at the trial that between the date of the application for the insurance and the date of the issuance and delivery of the policy there was such a change in the health or condition of the insured as would materially increase the risk or hazard, and that no notice of this change of health or condition and increase of risk or hazard was given or brought home to the insurance company prior to the issuance and delivery of the policy, but while the widow of the insured was on the stand as a witness on the trial in the court below the following offer of proof was made on her behalf:

"That if the witness were permitted to answer the question propounded and such questions as would properly bring this matter out, she would testify as follows: that after her husband, Anton Stipcich, had been examined and X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Goldentz, 4 fol. 11 agent of the defendant, and told him, in the presence of her husband, that the Doctor had recommended an operation, possibly for an ulcer; that the Doctor had said he didn't know whether it was an ulcer, but thought it was, and that at the time Mr. Julien Goldentz was agent for the defendant company."

The Julien Coblentz referred to in the above offer of proof was the agent of the Metropolitan Life Insurance Company who solicited and procured the application for the insurance, and the Dr. Sommer thereon referred to was one of the doctors consulted by the insured at Portland, Oregon. The court below sustained an objection to this offer of proof and an exception was duly taken and allowed. At the close of the testimony the court directed a verdict in favor of the defendant.*

Question Certified.

The question of law concerning which the Circuit Court of Appeals for the Ninth Circuit desires instruction from the Supreme Court is:

Was it competent to prove by parol testimony that the agent who solicited and procured the application for the insurance in behalf of the insurance company was informed and had notice of the change in the health and condition of the insured and of the increase in the risk and hazard after the written application for the policy was made and before the policy was issued and delivered, as set forth in the above offer of proof, for the purpose of establishing a waiver or creating an estoppel in view of the stipulations contained in the application for the insurance and more especially of the stipulations

"That any statement made to or by, or any knowledge or the want of any agent, medical examiner or any other person as to any facts pertinent to the Applicant shall not be considered as having been made to or brought to the knowl

*Coblentz testified (Tr. p. 26): "It is my duty to look for insurance, collect premiums when they are due. I have nothing to do with the acceptance or issuance of policies."

Hoffman testified (Tr. p. 29): "I am Assistant Manager of the defendant Metropolitan Life Insurance Company at its offices at Astoria, Oregon, and was such during all the transactions referred to in this action. * * * I have no authority to pass upon applications for policies or pass upon medical examinations."

edge of the Company unless stated in either part A or B of this application."

WM. B. GILBERT,
WILLIAM H. HUNT,
FR. H. RUDKIN,
United States Circuit Judges.

The facts stated and question propounded may be paraphrased and stated generally as follows:

First: It is implied in the question and true as a proposition of law that the representations made by an applicant for life insurance must be true as of the time of the consummation of the contract and if there is any change in the physical condition of the applicant material to the risk occurring between the making of the application and the consummation of the contract, it is imperative upon him to notify the insurer.

Second: Whether in view of the stipulations of the policy, as a proposition of general jurisprudence, the knowledge of a soliciting agent for a life insurance company concerning matters material to the risk, not contained in the application or otherwise brought to the attention of the company, is imputed to his principal in such manner and to such extent as to create a waiver or estoppel. We contend it is not.

Third: Whether in view of the stipulations of the policy, such propositions of general jurisprudence are changed or abrogated by the statutes of Oregon referred to. We contend they are not.

Fourth: Whether information to Coblentz, the soliciting agent of the insurer, in view of the stipula-

tions of the policy and the principles discussed in Sections Two and Three herein, satisfies the requirement that any change in the physical condition of the applicant must be brought to the attention of the insurer. We contend it is not.

FIRST

IT IS IMPLIED IN THE QUESTION AND TRUE AS A PROPOSITION OF LAW THAT THE REPRESENTATIONS MADE BY AN APPLICANT FOR LIFE INSURANCE MUST BE TRUE AS OF THE TIME OF THE CONSUMMATION OF THE CONTRACT AND IF THERE IS ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MATERIAL TO THE RISK OCCURRING BETWEEN THE MAKING OF THE APPLICATION AND THE CONSUMMATION OF THE CONTRACT IT IS IMPERATIVE UPON HIM TO NOTIFY THE INSURER

*The authorities are unanimous that any change in the physical condition of the applicant pending the consideration of his application by the insurer and prior to the actual consummation of the contract by delivery of the policy and payment of the premium, must be brought to the attention of the company.**

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*Mutual Life Ins. Co. of N. Y. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. Rep. 676, 60 L. Ed. 1197.

Penn. Mutual Life Ins. Co. v. Mechanics Savings Bank & Trust Co., 72 Conn. 671, 45 Atl. 953, 50 L. R. A. 193, 77 Am. St. Rep. 343.

Equitable Life Assurance Society v. McElroy, 83 Fed. 631, 27 C. C. A. 592, 40 L. R. A. 33.

Callen v. Metropolitan Life Ins. Co., 111 Fed. 39, 49 C. C. A. 183.

Wilson v. Phoenix Mutual Life Ins. Co., 25 Fed. Cas. No. 17,857, 4 Dillon 556.

Westlake v. Piedmont & Arlington Life Ins. Co., 71 N. C. 486.

Thompson v. Travelers Ins. Co., 15 S. D. 444, 90 N. W. 266, 58 L. R. A. 923, 1 Ann. Cas. 1.

Gardiner v. Colonial Mutual Ins. Co., 6 L. R. A. (Ann. Cas. 1914 D.) 1057, 1 Ann. Cas. 1914 D. 1057.

Hall v. Mutual Life Ins. Co., 80 Cal. 440, 22 Pac. 302, 5 L. R. A. 705, 13 Am. St. Rep. 168.

Cushman v. Phoenix Mutual Life Ins. Co., 109 Me. 70, 82 Atl. 649, 39 L. R. A. (N. S.) 1, Ann. Cas. 1914 C. 1.

Bowers v. Security Mutual Life Ins. Co., 130 Iowa 323, 170 N. W. 474, 2 A. L. R. 1564.

Franklin Bureau, 4 Dec. C. A. S. 318, 10 L. C. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 577, 12 Week. Rep. 678.

Royal Exchange Ins. Co. v. Grand Western R. Co., 38 L. J. Ch. N. S. 354, 20 L. T. N. S. 442, 17 Week. Rep. 561.

Cushing v. Farquhar, 1 R. 16 Q. Div. 337.

In *Equitable Life Ass. Soc. v. McElroy*, United States Circuit Court of Appeals, the court said:

> "They [the proposals and the ultimate contract] are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the [insurance] company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed. An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract."

Justice Story in *M'Lanahan et al. v. The Universal Insurance Company*, said:

> "The contract of insurance has been said to be a contract uberrimæ fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same informa-

tion for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infests the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or having the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void."

Of course, if the contract of insurance is actually consummated before the loss of the property insured, or before the change of condition on the part of the person insured, no duty devolves upon the insured to communicate such loss or change to the insurer; and all of the cases which are sometimes relied upon as authority for the proposition that the insured is at no time after his application for insurance bound to disclose facts material to the risk, will be found to admit either expressly or impliedly, the general principle under consideration and to have based their decision entirely upon the ground that the contract was

consummated or completed before the happening of the contingency relied upon to defeat the policy.†

In the case of *Mutual Benefit Life Ins. Co. v. Higginbotham*, relied upon by plaintiff in error, this court recognizes the principle. That was a case of a revival of an expired policy, not the placing of a new policy. The insured made application for the revival of his policy and delivered a certificate of health on October 1, 1870. The revival certificate was delivered on October 14, 1870. It was contended that between October 1st and 14th, a change took place in the condition of the insured which should have been brought to the attention of the insurer. The court says:

> "The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the first day of that month."

In other words, the court held that the insured was not bound to communicate to the insurer changes in his physical condition after the consummation of the contract. The court further says:

> "*If we assume* it to be true, as a general proposition, that the policy speaks from the date of its issue, and *that the obligation of the applicant to make a full disclosure continues down*

†*Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380; 24 L. Ed. 490; *De Camp v. New Jersey Mut. L. Ins. Co.*, 3 Ins. L. J. 89; Fed. Cas. No. 3,719.
Southern L. Ins. Co. v. Kempton, 56 Ga. 239.
Keim v. Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291.
Baldwin v. Chouteau Ins. Co., 56 Mo. 131, 17 Am. Rep. 671.
Worth v. German Ins. Co., 65 Mo. App. 582.
Gordon v. United States Casualty Co., (Tenn. Ch. App.) 54 S. W. 38.
Lehman v. Northern Maritime Ins. Co., L. R. 10 C. P. 179; 4 Ins. L. J. 394.

> *to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the Company, we do not advance essentially in the case before us.* The question recurs: when was the contract of Dr. Day consummated? If on the 11th day of October, when the renewal receipt was delivered, as the Company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the first of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the Company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. *It is not necessary, therefore, to question the principle assumed in the authority quoted, or examine the cases cited to sustain it.*"

The other cases cited in the footnote are to the same effect.

In the present case, as appears from the statement of facts, the change in condition occurred prior to the delivery of the policy and the application itself provides:

> "That the Company shall incur no liability under this application until it has been received, approved and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the Company during the life time of the applicant." (Transcript p. 28.)

Hence the *Higginbotham* case cannot apply.

SECOND

WHETHER IN VIEW OF THE STIPULATIONS IN THE POLICY, AS A PROPOSITION OF GENERAL JURISPRUDENCE, THE KNOWLEDGE OF A SOLICITING AGENT FOR A LIFE INSURANCE COMPANY CONCERNING MATTERS MATERIAL TO THE RISK NOT CONTAINED IN THE APPLICATION OR OTHERWISE BROUGHT TO THE ATTENTION OF THE COMPANY IS IMPUTED TO HIS PRINCIPAL IN SUCH MANNER AND TO SUCH EXTENT AS TO CREATE A WAIVER OR ESTOPPEL. WE CONTEND IT IS NOT.

An insurer has the right to limit its agents' authority in the respect stated in the question certified and such limitation is binding upon the insured where brought to his notice; and such limitation is necessarily and conclusively brought to his notice when it is made a part of the application.

In the case of *New York Life Insurance Company v. Fletcher*, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these representations were but a mere formality and had inserted false answers in the application.

[illegible]

The application, however, provided that:

"No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

This court said (p. 529):

"It is, of course, not necessary to argue that the agent had no authority from the Company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the Company were deceived by the fraudulent contrivance of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the Company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. * * *

"But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. * * * But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application he would have seen that it stipulated that the rights of the Company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. *The Company, like any other principal, could limit the authority of its agents,*

and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed."

The court went on to say (p. 531):

"The present case is very different from *Ins. Co. v. Wilkinson*, 13 Wall. 222 (80 U. S. bk. 20, L. ed. 617), and from *Ins. Co. v. Mahone*, 21 Wall. 152 (88 U. S. bk. 22, L. ed. 595). In neither of these cases was any limitation upon the powers of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. *Nothing in these cases has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.*"

The court further says, (p. 534):

"There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would at once be disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the Company, and it would have been his duty to make the fact known to the Company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. *The retention of the policy was an*

approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.

"The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it."

The opinion of this court in the case of *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, crystallizes the law upon the subject. That case involved a policy of fire insurance which provided (p. 311) that it should be void if the insured had other insurance on the property covered thereby. The plaintiff (insured) did have other insurance, but claimed that the insurer's agent had been informed of the fact, and pleaded a waiver and estoppel to set up the fact of other insurance in defense of the action upon the policy. *The policy further provided* (p. 312) *that no officer or agent had the power to waive any of the conditions or provisions except and unless endorsed on the policy.*

This court said (p. 341):

"We do not consider it necessary or profitable to examine in detail the decisions of the circuit

courts or of the circuit courts of appeals. It is sufficient, for our present purpose, to say that the Circuit Court of Appeals for the Seventh Circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally (*United Firemen's Ins. Co. v. Thomas*, 47 L. R. A. 450, 27 C. C. A. 42, 53 U. S. App. 547, 82 Fed. 1003), and that the Court of Appeals for the Eighth Circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. * * *"

The court then reviews the cases on the subject and announces the principles applicable (p. 361):

"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; *that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing.*

either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The court then applies the principles to the case then before it, saying (p. 363):

"It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the

jury have found, that the agent had notice or knowledge of the existence of insurance existing in other company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. *In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured.*"

The court concludes the opinion, by stating (p. 364):

"Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The case of the *Aetna Life Insurance Co. v. Moore*, is to the same effect. The insured, one Salgue, applied

to the Aetna Life Insurance Company for a policy on his life. The policy provided, among other things:

> "*No agent or other person not an executive officer can waive any of the conditions of this policy, nor make any agreement binding upon said Company.*"

The insured represented himself in good health, but was, in fact, found to be afflicted with heart disease, and upon this ground the insurer resisted payment of the policy. Plaintiff claimed, however, that Salgue had correctly informed the medical examiner of his condition.

The court says (pp. 559-560):

> "It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.
>
> "*There are, however, later cases which enforce the provisions of a policy*, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as

having been made to or brought to the notice or knowledge of the company, "or as charging it with any liability by reason thereof". And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

"*The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by* Northern Assur. Co. v. Grand View Building Asso., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso. 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co. 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

We, therefore, submit that the principles of law as a proposition of general jurisprudence, have been settled by this court to the effect that an insurer may limit the authority of its agent and may provide that the knowledge of the agent shall not be the knowledge of the principal unless conveyed to the principal in a definite and stipulated way and that such limitations are binding upon the insured when brought to his attention; and that such limitations are conclusively brought to his attention when contained in the application and or policy.

This court itself has said that these propositions are principles of general jurisprudence. *Aetna Life Ins. Co. v. Moore*, supra, at p. 559, citing *Kuhn v. Fairmount Coal Co.*, 215 U. S. 39.

It is interesting to note that the principles announced have the unanimous support of the lower federal courts.[1]

The great majority of the state courts support this proposition. In fact many of them go further and hold: that even in the absence of provisions in the contract limiting the agent's authority, the knowledge of an agent concerning matters material to the risk is not to be imputed to his principal and that an agent has not authority to waive grounds which the principal may have of declaring a forfeiture.[2]

Or that when the agent's authority is expressly limited in the contract, the knowledge of a *general* agent concerning matters material to the risk, is not imputed to his principle and that a general agent has

[1] *Supreme Council of Royal Arcanum v. Taylor* (1904) 121 Fed. 66;
Modern Woodmen of America v. Tevis (1902) 117 Fed. 309;
Mallinkrodt v. Royal Insurance Co. of Liverpool, England (1908) 160 Fed. 833;
Crenshaw & Brough Co. v. St. Paul Fire & Marine Ins. Co. (1923) 5 Fed. (2nd) 489;
Fire Association of Philadelphia v. Nunes (1925) 9 Fed. (2nd) 28;
Boston Insurance Co. v. Hudson (1926) 13 Fed. (2nd) 961;
Northern Assurance Company of London v. Case (1926) 12 Fed. (2nd) 261;
Hartford Fire Ins. Co. v. Nunes (1926) 12 Fed. (2nd) 373;
West End Hotel Co. v. American Fire Ins. Co. of N. Y. (1896) 74 Fed. 514;
West Thurston et al. v. Maryland Casualty Co. at Baltimore (1910) 181 Fed. 49;
Lake Borgne S. I. Ins. Co. v. Hough (1901) 110 Fed. 524;
Carothers v. Missouri Mut. I. Ins. Co. (1901) 108 Fed. 487.

[2] *Iowa*
Gunderson v. Merchants & Farmers Ins. Co. 81 Ia. 727, 45 N. W. 1047;
Dodds v. Scandinavian Fire Ins. Co. 94 Ia. 424, 62 N. W. 798.
Michigan
Bonnicastle v. North. Ins. Co. of Scotland (1911) 167 Mich. 274, 132 N. W. 1067.
New York
Bailey v. Workingmen Mut. Fire Ins. Co. 184 N. Y. 432, 77 N. E. 398. Approved in
Wilkinson v. Security Fire Ins. Co. 220 N. Y. 447, 116 N. E. 74.
Rhode Island
Sullivan v. Firemen's Ins. Co. 1920, 42 R. I. 433, 108 Atl. 579;
Reed v. Equitable Ins. Co. 17 R. I. 785, 24 Atl. 833.

not authority to waive grounds which the principal may have of declaring a forfeiture.

When the agent's authority is expressly limited in the contract, the knowledge of a *soliciting* agent concerning matters material to the risk is not imputed to his principle and a soliciting agent has not authority to waive grounds which the principal may have of declaring a forfeiture.

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(1) Iowa:
Ruthven v. American Fire Ins. Co. 92 Ia. 330, 60 N. W. 663;
Zimmerman v. Home Ins. Co. of New York, 77 Ia. 691, 42 N. W. 502.
Michigan:
Cook v. Standard L. & A. Ins. Co. 84 Mich. 2, 47 N. W. 568.
Oklahoma:
Gist v. Ins. Co. 35 N. C. 10, 98 Pac. 87, 99 Pac. 869.
West Virginia:
Morgan v. Ins. Coal Ins. Co. 1917 So. W. Va. 1, 92 S. E. 84.
(2) Alabama:
Powell v. Prudential Ins. Co. of Am. 153 Ala. 611, 45 So. 208.
California:
Iverson v. Metropolitan Life Ins. Co. 153 Cal. 740, 91 Pac. 609;
Silverman v. Continental Ins. Co. 167 Cal. 137, 138 Pac. 708.
Georgia:
New York Life Ins. Co. v. Pottle, 131 Ga. 185, 106 S. E. 183;
Thornton v. Travellers' Ins. Co. 126 Ga. 121, 42 S. E. 287.
Kansas:
Pettijohn v. St. Paul etc. Ins. Co. 100 Kan. 482, 164 Pac. 1096.
Louisiana:
Thomas v. Detroit etc. Ins. Co. 142 La. 349, 83 So. 236;
Peoples Bank of Donaldsonville v. National etc. Ins. Co. 130 La. 931, 58 So. 826.
Massachusetts:
Hayes v. Metropolitan Life Ins. Co. 230 Mass. 476, 128 N. E. 780;
Porter v. U. S. Life Ins. Co. 160 Mass. 181, 35 N. E. 678.
Maryland:
Crook v. New York Life Ins. Co. 112 Md. 208, 75 Atl. 388.
Michigan:
Kirkham v. Am. Mut. Accid. Assn. 117 Mich. 321, 76 N. W. 5.
Mississippi:
New York Life Ins. Co. v. O'Dom, 106 Miss. 211, 63 So. 429.
Montana:
Collins v. Metropolitan Life Ins. Co. 52 Mont. 329, 80 Pac. 606.
New York:
McCormick v. Security Mut. Life Ins. Co. 220 N. Y. 447, 116 N. E. 24.
Ohio:
Ohio Farmers' Ins. Co. v. Tyler, 82 Oh. St. 161, 92 N. E. 82.
Oklahoma:
Modern Woodmen v. Wroblin, 42 Okl. 22, 139 Pac. 1118;
Merchants & Planters Ins. Co. v. Marsh 34 Okl. 453, 125 Pac. 1100.
Texas:
Northwestern Nat. Ins. Co. v. Muse (Tex. Civ. App.) 34 S. W. 670.
South Carolina:
Rath v. New York Life Ins. Co., 188 S. C. 137, 93 S. E. 711.

There are a few state courts, however, that disagree with the principles announced.[7]

THIRD

WHETHER IN VIEW OF THE STIPULATIONS OF THE POLICY, SUCH PROPOSITIONS OF GENERAL JURISPRUDENCE ARE CHANGED OR ABROGATED BY THE STATUTES OF OREGON REFERRED TO. WE CONTEND THEY ARE NOT.

The statutes of Oregon do not purport to define or enlarge the powers of insurance agents.

We believe the relation of the insurance agent to his principal and to the insured and the relation of the insured to each of them, respectively, to be a matter of general jurisprudence and, therefore, since it is not a rule of property it is not controlled in the federal courts by state statutes. (*Prudential Ins. Co. v. Moore*, supra.)

We find this aptly phrased by the Circuit Court of Appeals for the Sixth Circuit in *Hartford Fire Ins. Co. v. Nance*, 12 Fed. (2nd) 575:

[7] Arkansas:
People's Ins. Assn. v. Keane, 70 Ark. 310, 96 S. W. 566;
Excelsior Home Ins. Co. v. Bridges, 92 Ark. 11, 11 S. W. 1016.
Florida:
Southern States Fire Ins. Co. v. Yates, 60 Fla. 349, 48 So. 647.
Illinois:
Phoenix Ins. Co. v. Burt, 249 Ill. 513, 36 N. E. 996.
Nebraska:
Grand View Bldg. Assn. v. Northern Assurance Co., 73 Neb. 149, 102 N. W. 246.
North Carolina:
Bullard v. Peel F. Ins. Co., 93 N. C. 340, 180 N. C. 34, 126 S. E. 179;
Johnson & Stroud v. Rhode Island Ins. Co., 172 N. C. 142, 90 S. E. 124;
Fishblate v. F. & C. Co. of New York, 140 N. C. 589, 53 S. E. 354.

[8] *Mutual Life Ins. Co. v. Hillmon*, 241 U. S. 613;
Makowski v. Royal Ins. Co., 163 Fed. 868;
Maryland Casualty Co. v. Campbell, 255 Fed. 437;
Keelon v. Jefferson Standard Life Ins. Co., 5 Fed. (2nd) 183;
Hartford Fire Ins. Co. v. Nance, 12 Fed. (2nd) 575;
Hartford Fire Ins. Co. v. Jones, 15 Fed. (2nd) 4.

> "We think the State law does not control, because neither the validity of the contract nor any statute of the state nor local rule of property is involved. The contract was valid under the Ohio law. What we must finally determine is not a matter of validity or interpretation: it is whether the terms of a written contract, where the contract itself prohibits modification except in writing may be valid by parole evidence for the purpose of asserting estoppel. *This, we think, is a matter of general jurisprudence.*"

And the court there proceeds to hold that a statute of Ohio, similar in effect to the statute of Oregon here involved, in making the person soliciting the insurance the agent for the company would *not* prevent the company from relying upon a misrepresentation contained in the application though the true situation was known to the agent.

The same court adhered to its position in the case of *Hartford Fire Ins. Co. v. Jones*, 15 Fed. (2nd) 1.

This court has not gone so far as to directly hold under the precise circumstances that the scope of the relation of the insurer to its agent and of the insured to both is a matter of general jurisprudence, but was content to say in the case of *Mutual Life Ins. Co. v. Hilton-Green* that such statutes do not attempt to fix the scope of the authority of the agent; and for this case that is far enough. It *may* be within the province of a state legislature to provide that a person who solicits insurance shall be the agent of the company, although the relation is often one of brokerage rather than agency, but in this case we are not forced to discuss that subject, as it is conceded that Coblenz was the soliciting agent of the defendant insurer, and

that is all the statute purports to provide. The scope of the authority of the agent is still a matter of contract and, therefore, the character and limits of the agent's authority are regulated by the contract and principles of general jurisprudence already referred to. Such is the rule laid down by this court in *Mutual Life Ins. Co. v. Hilton-Green*, as follows:

> "Considered in most favorable light possible, the above quoted incorrect statements in the application are material representations; and, nothing else appearing, if known to be untrue by assured when made, invalidate the policy without further proof of actual conscious design to defraud. Moulor v. American L. Ins. Co., 111 U. S. 335, 345, 28 L. ed. 447, 450, 4 Sup. Ct. Rep. 466; Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. Rep. 500; Aetna L. Ins. Co. v. Moore, 231 U. S. 543, 556, 557, 58 L. ed. 356, 365, 366, 34 Sup. Ct. Rep. 186; May, Ins. 4th ed. § 181.
>
> "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing. Distilled Spirits (Harrington v. United States) 11 Wall. 356, 367, 20 L. ed. 167, 171; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 985, 18 Sup. Ct. Rep. 552; American Natl. Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 1313, 33 Sup. Ct. Rep. 883; Mechem, Agency 2d ed. § 1815.
>
> "*Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons*

who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and the third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company, with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. (Italics ours.) See Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 343, 10 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, 103; Wood v. Firemen's F. Ins. Co., 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 234, 235, 37 L. R. A. 131, 70 N. W. 84.

"The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties. New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 534, 29 L. ed. 934, 939, 940, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso., 183 U. S. 308, 361, 46 L. ed. 213, 234,

22 Sup. Ct. Rep. 133; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503.

"Considered with proper understanding of the law, there is no evidence to support a verdict, against petitioner, and the trial court should have directed one in its favor."

It will be observed this court cites *Continental Life Insurance Co. v. Chamberlain*, 132 U. S. 304, in support of its decision that the statutes of Florida do not define or fix the scope of the agency, although it has been cited to the contrary in some of the state courts. It is, however, entirely consistent with and in support of the decision of this court in the case of *Mutual Life Insurance Co. v. Hilton-Green*. In the *Chamberlain* case, one of the questions asked of the insured in his application was whether he had any other insurance on his life. The answer, written by the agent, was "No other". In fact, the insured had certain *certificates of membership in certain cooperative societies*, which fact he stated to the agent and the question arose between them as to whether these certificates did or did not constitute other insurance and it was agreed between them that it did not. Hence, the answer "No other" was written in the application.

This court says (pp. 311, 312):

"It is true that among the 'Provisions and Requirements', printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and in the application, and 'none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated'.

> But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. *The purport of the word 'insurance' in the question, 'Has the said party any other insurance on his life?' is not so absolutely certain as, in an action upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute and of the understanding reached between the assured and the Company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not preclude the insurance in cooperative societies.* In view of the statute and of that understanding, upon the faith of which the assured made his application, paid the first premium and accepted the policy, the Company is estopped, by every principle of justice, from saying that its question embraced insurance in cooperative associations. *The answer of "No other"* having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, *should be held as properly interpreting both the question and the answer as to other insurance."*

In the present case, Coblentz admittedly was the agent of the insurer, but his authority as such was limited. Whether a state statute might constitutionally enlarge or modify those limits is beside the question. Neither in the *Chamberlain* case, the *Hilton-Green* case, nor in this, does the statute purport to enlarge or modify or prescribe the limits of the agency or the powers of the agent. The Oregon statute says merely:

> "Any person who shall solicit and procure an application for life insurance, shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded the agent of the company issuing the policy and not the agent of the insured * * *."

It does not purport to say that the agent shall not have the power to waive or modify the provisions of the application, nor does it purport to say that the knowledge of the agent shall in any respect be the knowledge of the principal. That is, advisedly, left open to be regulated and conditioned by the parties themselves as evidenced in the application.

FOURTH.

WHETHER INFORMATION TO COBLENTZ, THE SOLICITING AGENT OF THE INSURER, IN VIEW OF THE STIPULATIONS OF THE POLICY AND THE PRINCIPLES DISCUSSED IN SECTIONS TWO AND THREE HEREIN, SATISFIES THE REQUIREMENT THAT ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MUST BE BROUGHT TO THE ATTENTION OF THE INSURER. WE CONTEND IT DOES NOT.

The stipulations of the application to the effect that the knowledge of the agent shall not be the knowledge of the principal and that the agent has no power to make, modify, or discharge the contract of insurance, or to bind the company by making any promises respecting any benefits under the policy, operated prospectively.

If the propositions already discussed are true, then it must follow that the insured must bring any change in his physical condition occurring between the ap-

plication and the consummation of the contract to the knowledge of the officers of the insurer, not merely to the soliciting agent.

In *principle* the doctrine of the decision of this court in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, is apposite.

The application here was made a part of the policy (Transcript p. 23, 8). When the policy was delivered into the hands of Stipcich, the insured, he would see immediately that no mention was made in the application of his changed condition of health, and he must immediately know one of two things: either that he did not notify Coblentz of his changed condition, or, if he did, Coblentz had not conveyed it to his principal, the company. It would be then his duty as said by this court in the *Fletcher* case to call that circumstance to the attention of the insurer.

This court says in the *Fletcher* case:

> "There is another view of this case equally fatal to a recovery; assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the Company, and it would have been his duty to make the fact known to the Company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.
>
> "The court charged the jury that if the assured had discovered the fraud before the policy was

delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it."

If, as said by this court in the case of *M'Lanahan v. The Universal Insurance Co.*, 1 Pet. 170, the relation of the parties to an insurance contract is one of mutual good faith and confidence, and if the applicant (in this case Stipcich), observed that his policy was based upon his original application, without any amendment or modification concerning his changed condition of health, then *good faith* on his part demanded that he return the policy with the request that such amendment or notation be endorsed thereon, so that in the event of his death the clear understanding of the parties will be evidenced by the policy.

Again, if, apart from the mere question of good faith, the insurer had the right and power to stipulate in the first instance that the knowledge of the soliciting agent should not be the knowledge of the insurer, then it is clear that that power and right continues throughout to the consummation of the contract, i. e., delivery of the policy and payment of the premium, and, in the absence of affirmative proof

that the information concerning the changed condition of health actually penetrated beyond the knowledge of the soliciting agent to the officials of the Company, then, upon principles of law already discussed, no recovery may be had. In other words, both good law and good faith united to preclude a recovery.

It would be little less than idle to uphold an agreement in a life insurance application denying to the principal the imputed knowledge of information given to the agent only to a period anterior the application. If these stipulations are valid at one time they must be at another. Direct knowledge to the insurer is as important posterior the application and before the consummation of the contract as it is anterior the application.

Suppose the applicant, having knowledge or at least suspicions that all is not well with him, makes out and signs an application for insurance without disclosing his condition or his suspicions. He then, the following day, receives medical confirmation of his knowledge or suspicion and relates it to the agent. Is not the position of the insurer in such case the same as if the agent's knowledge is acquired anterior to or contemporaneously with the application?

That is exactly what happened in this case. Stipcich knew on the Saturday preceding that his stomach was troubling him again. He concealed this information from the agent—this in itself constituting misrepresentation—then subsequently, he went to his physician and received confirmation of his suspicions that in all probability his ulcer had returned. He had

further examination, an operation, and died (Certificate p. 3, fol. 3.) So far as the insurer is concerned, the effect of these circumstances upon its action upon the application is exactly the same as if Coblentz, the soliciting agent, had the information prior to the making of the application, and it was not disclosed in the application. In other words, the position of the insurer is the same whether the information came to the agent before or after the date of the application; and the stipulations of the application should be given the same weight and effect. When the reason is the same the rule should be the same.

It is respectfully submitted that the question should be answered in the negative.

Dated, San Francisco,
September 14, 1927.

F. Eldred Boland,
Samuel Knight,
Attorneys for Defendant in Error.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 97

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

SUPPLEMENTAL AND REVISED BRIEF FOR DEFENDANT IN ERROR.

F. ELDRED BOLAND,
SAMUEL KNIGHT,
Balfour Building, San Francisco,
Attorneys for Defendant in Error.

Francis-Valentine Company, San Francisco

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In the Supreme Court
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OCTOBER TERM, 1927

No. 97

JOSEPHINE STIPCICH,
Plaintiff in Error,

vs.

METROPOLITAN LIFE INSURANCE COMPANY
(a corporation),
Defendant in Error.

SUPPLEMENTAL AND REVISED BRIEF FOR DEFENDANT IN ERROR.

On February 16, 1924, Anton Stipcich, of Astoria, Oregon, called upon his family physician, Dr. Toivo Forsstron, who had operated on him for duodenum ulcer some two years previous, complaining of pain and distress after eating (T. 87). Dr. Forsstron gave Stipcich a prescription which was filled the same day (T. 80).

Later in the afternoon of the same day, Stipcich, with his wife, called at the office of the Metropolitan Life Insurance Company at Astoria and there met

Mr. Julien Coblentz, an agent of the Insurance Company, stating that he was then ready to apply for the life insurance for which Coblentz had been canvassing him for some time. An appointment was made at the Stipcich home for the following day to prepare the application (T. 77).

On the following day, February 17, Sunday, Coblentz called at the Stipcich home and took his application for the life insurance in question (T. 77).

On the next day, ~~March~~ February 18, Stipcich attended upon the medical examiner of the defendant Insurance Company for his medical examination to complete his application as to his health (T. 98). He there disclosed the operation some two years previous (T. 32), but *denied the consultation with Dr. Forsstron on the day previous* (T. 34, 35).

Dr. Forsstron had told Stipcich he were not relieved to come back later, which he did, and was advised by Dr. Forsstron that he should have an "X-ray" (the doctor being suspicious of a recurrence of the ulcer) (T. 91).

On March 7th, Stipcich went to Portland and there consulted a Dr. Sommer, who sent him to the hospital for an "X-ray" examination and observation. Stipcich remained at the hospital from March 8th to March 14th (T. 93); and as a result of this examination and the "X-ray", Dr. Sommer advised him that he had an ulcer for which he should have an operation (T. 94).

Again, on March 20th (T. 82), Stipcich went to Portland to the office of Dr. Coffey and was there

examined by a Dr. Slater, an associate of Dr. Coffey. Here he had another "X-ray" examination and was advised by Dr. Slater that he had a stomach (peptic) ulcer (T. 84).

On March 26th, Stipcich, this time accompanied by his wife, considering whether he should undergo the operation, again went to Portland and again consulted with the physicians concerning their advice that he was afflicted with an ulcer (T. 108).

On March 26th, while Stipcich and his wife were in Portland receiving confirmation of the diagnosis that he was afflicted with an ulcer and should have an operation, the Insurance Company issued the policy in question (T. 10) and it was later (the exact date does not appear, but probably March 29th) delivered and the premium paid.

On April 5th, Stipcich went on the operating table (T. 109), dying shortly thereafter from peritonitis resulting from the operation (T. 97).

Testimony was offered by the plaintiff to the effect that Mrs. Stipcich told Coblentz, the soliciting agent of defendant Insurance Company, "that after her husband, Anton Stipcich, had been examined and the X-ray pictures had been taken of him by Dr. Sommer, that she communicated all these facts to Mr. Julien Coblentz, agent of the defendant, and told him, in the presence of her husband, that the doctor had recommended an operation, possibly for an ulcer; that the doctor had said he didn't know whether it was an ulcer, but thought it was" (T. 105).

Other than this, no information of the ulcerous condition of Stipcich was given the Insurance Company.

The application was at no time altered to show the visit of Stipcich to Dr. Forsstron on February 16th, the day previous to his application for insurance, nor to include any relation of the altered physical condition of Stipcich as developed in his consultations with Dr. Sommer and Dr. Slater; and the policy was delivered to and accepted by Stipcich with the application in its original form affixed to and made a part of the policy.

Under these facts the defendant contends:

First: Stipcich was under an obligation to inform the defendant Insurance Company of his changed physical condition and of the advice given him by his physicians. That proposition is thoroughly entrenched behind the authority of this Court.

Second: The policy is the entire contract; including the representations in the application as to the condition of health of Stipcich at the time the policy was delivered.

Third: The policy as issued and delivered does not in reality state the entire contract; it omits to mention the changed condition; a very important, even paramount, element of the contract.

Fourth: It was the duty of Stipcich to read the contract and take exception to the fact of this important omission. If he had read it, as it was his duty to do, he would have known one of two things had happened,—either

(a) He had not made known his changed condition at all, which would be a fraud on his part, or

(b) He would have known that Coblentz, the agent, had omitted to mention it to the Insurance Company, which would be a fraud on the agent's part and which Stipcich, either by failing to read the policy or, having read it, by failing to object to the omission, adopted by his silence.

Fifth: (a) It is the fact, regardless of the law of Oregon, that Coblentz was the agent of the defendant Insurance Company for the soliciting of the insurance and delivery of the policy; but

(b) The Oregon law does not in any manner or to any extent attempt to define the scope of the agency or prescribe the power of the agent, or to alter the rule that the insured by accepting the policy, adopted and confirmed the fraud either of himself if he did not tell Coblentz of his changed condition, or of Coblentz if the latter did not tell defendant Insurance Company.

FIRST.

THE REPRESENTATIONS MADE BY AN APPLICANT FOR LIFE INSURANCE MUST BE TRUE AS OF THE TIME OF THE CONSUMMATION OF THE CONTRACT AND IF THERE IS ANY CHANGE IN THE PHYSICAL CONDITION OF THE APPLICANT MATERIAL TO THE RISK OCCURRING BETWEEN THE MAKING OF THE APPLICATION AND THE CONSUMMATION OF THE CONTRACT, IT IS IMPERATIVE UPON HIM TO NOTIFY THE INSURER.

M'Lanahan v. Universal Ins. Co., 1 Pet. 170;

Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377;

Equitable Life Ass. Soc. v. McElroy, 83 Fed. 631;

Cable v. U. S. Life Ins. Co., 111 Fed. 19;

Watson v. Delafield, 2 Caines 224, 1 Johns 150, 2 Johns 526;

Whitley v. Piedmont & A. L. Ins. Co., 71 N. C. 480;

Thompson v. Travelers Ins. Co., 13 N. D. 444, 101 N. W. 900;

Graham v. General Mutual Ins. Co., 6 L. A. Ann. 4832;

Hart v. British & F. M. Ins. Co., 80 Cal. 440, 22 Pac. 302;

Carleton v. Patrons A. M. Fire Ins. Co., 109 Me. 79, 82 Atl. 649;

Harris v. Security Mutual Life Ins. Co., 130 Tenn. 325, 170 S. W. 474;

Traill v. Baring, 4 De G. J. & S. 318, 10 L. T. N. S. 215, 33 L. J. Ch. N. S. 521, 10 Jur. N. S. 377, 12 Week. Rep. 678;

British Equitable Ins. Co. v. Great Western R. Co., 38 L. J. Ch. N. S. 314, 20 L. T. N. S. 422, 17 Week. Rep. 561;

Canning v. Farquhar, L. R. 16 Q. Div. 727.

Justice Sanborn said in *Equitable Life Ass. v. McElroy*, 83 Fed. 631:

"Fraud vitiates all contracts. But misrepresentations or concealments of the facts relative to the health of those whose lives are insured are peculiarly fatal to contracts of life insurance, because the companies necessarily rely upon the statements and acts of the assured in making their contracts. Companies cannot know and surgeons cannot discover by the appearance and examination of subjects many insidious and often fatal diseases, the symptoms of which are felt by their victims. Hence the companies require them to answer many questions as to their habits, their health, their symptoms, the longevity of their ancestors, and the causes of their disease. When these have been answered, and the examining surgeon has certified to the good health of the subject and the character of the risk upon his life, these answers and this certificate become the basis of the contract. In other words, the honesty, good faith, and truthfulness of the person whose life is insured form the actual foundation of the agreement of life insurance. It is for this reason that contracts of life insurance are said to be uberrimae fidei, and any material misrepresentation or concealment is fatal to them. When the representation of good health and the certificate of the surgeon have been made, and the contract is not immediately closed, but negotiations for it continue, and proposals and counter proposals are made, but for some time none are accepted, the representation and certificate continue and condition all the proposals and the ultimate contract, when it is closed. They

are all made in reliance upon the continued truth of the representation and certificate, and in the belief that there has been no material change in the health or the probability of the continued life of the subject. *The nature of this contract, the insurance of a man's life, the perfect familiarity of the man himself with the condition of its subject-matter, his own life, the ignorance of the insurance company concerning it, and its necessary reliance in making the contract upon his good faith, honesty, and truthfulness, impose upon him the duty of disclosing to the company every fact material to the risk which comes to his knowledge at any time before the contract is finally closed.* An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract."

Justice Story in *M'Lanahan et al. v. The Universal Insurance Company*, 1 Pet. 170, said:

"The contract of insurance has been said to be a contract uberrimae fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. *If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy.* If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infests the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And

> even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence, the information might have been communicated, so as to have countermanded the insurance, the policy is void."

In the case of *Mutual Benefit Life Ins. Co. v. Higginbotham,* 95 U. S. 380, relied upon by plaintiff in error, this Court recognizes the principle. That was a case of a revival of an expired policy, not the placing of a new policy. The insured made application for the revival of his policy and delivered a certificate of health on October 1, 1870. The revival certificate was delivered on October 14, 1870. It was contended that between October 1st and 14th, a change took place in the condition of the insured which should have been brought to the attention of the insurer. The Court says:

> "The facts referred to, we think, show that, although actually completed on the 14th of October, the jury would have been warranted in finding that the contract was understood and intended by the parties to take effect by relation as of the first day of that month."

In other words, the Court held that the insured was not bound to communicate to the insurer changes in

his physical condition after the consummation of the contract. The Court further says:

> "*If we assume* it to be true, as a general proposition, that the policy speaks from the date of its issue, and *that the obligation of the applicant to make a full disclosure continues down to the completion of the contract, and that the occurrence of a material change before the contract is consummated must be communicated to the company, we do not advance essentially in the case before us.* The question recurs: when was the contract of Dr. Day consummated? If on the 14th day of October, when the renewal receipt was delivered, as the company contends, then the rule mentioned bars the plaintiff's right to recover. If, as the plaintiff contends, the contract, by the intention and understanding of the parties, relates to the first of October, when the premium was paid by the applicant and the certificates of health presented and transmitted, or to a point of time within a few days thereafter, within which the company ought to have examined and to have accepted a risk in all respects suitable to be accepted within its own rules, then the general rule quoted is not applicable. The case is governed by different principles. *It is not necessary, therefore, to question the principle assumed in the authority quoted, or examine the cases cited to sustain it.*"

SECOND.

THE POLICY IS THE ENTIRE CONTRACT; INCLUDING THE REPRESENTATIONS IN THE APPLICATION AS TO THE CONDITION OF HEALTH OF STIPCICH AT THE TIME THE POLICY WAS DELIVERED.

It is contended by plaintiff in error that this obligation to report the changed condition in health to the Insurance Company was satisfied by communica-

tion thereof to Coblentz, the soliciting agent. It is contended by defendant in error that Coblentz, as soliciting agent, had no authority to receive or bind the Insurance Company by such knowledge; that the limitation upon his authority was contained in the application, and, therefore, it was incumbent upon plaintiff in error to communicate directly with the Insurance Company. These matters are fully covered in the briefs already filed.

Now that the Court has the entire record before it and is not limited in its consideration by the form or text of the question propounded by the Circuit Court of Appeals, the case may be considered in an entirely different aspect:

That is, assuming that the information was communicated to Coblentz and assuming his authority to receive it, does the case stand any different than it would if the information had come to Stipcich before he made the application, and he had in turn communicated it to Coblentz or the medical examiner, but the latter had failed to put the same in the application? Both the law of Oregon and the policy provide that the policy and application shall state the entire contract.

Laws of Oregon, Sections 6422, 6426;
Transcript, p. 12.

But in this case

THIRD.

THE POLICY AS ISSUED AND DELIVERED DOES NOT IN REALITY STATE THE ENTIRE CONTRACT; IT OMITS TO MENTION THE CHANGED CONDITION; A VERY IMPORTANT, EVEN PARAMOUNT, ELEMENT OF THE CONTRACT.

The policy itself provides (T. 12) that:

> "This policy (and the application therefor) constitutes the entire contract between the parties and, except for non-payment of premiums, shall be incontestable after two years from the date of its issue."

In his application Stipcich denied that he had consulted Dr. Forsstron the day previous to his application (T. 34), or that he had been treated for any illness within five years (T. 35); and he makes no disclosure on the application or on the policy that he was afflicted with stomach ulcer and had been advised to have an operation.

Upon the face of the policy as delivered and accepted Stipcich was a good risk for the amount of the insurance. In point of fact, he was not a good risk at the time the policy was delivered; and, further, he knew he was not a good risk.

He (and plaintiff) knew that the changed condition must be brought to the attention of the Insurance Company,—else why make such a point of telling Coblentz?

He knew that the fact of this changed condition must, under the law of Oregon (upon which plaintiff so much relies) and under the terms of the policy, be incorporated therein; that it was a material part of the contract.

But it was not there; something was wrong. Therefore,

FOURTH,

IT WAS THE DUTY OF STIPCICH TO READ THE CONTRACT AND TAKE EXCEPTION TO THE FACT OF THIS IMPORTANT OMISSION. IF HE HAD READ IT, AS IT WAS HIS DUTY TO DO, HE WOULD HAVE KNOWN ONE OF TWO THINGS HAD HAPPENED,—EITHER

(A) HE HAD NOT MADE KNOWN HIS CHANGED CONDITION AT ALL, WHICH WOULD BE A FRAUD ON HIS PART, OR

(B) HE WOULD HAVE KNOWN THAT COBLENTZ, THE AGENT, HAD OMITTED TO MENTION IT TO THE INSURANCE COMPANY, WHICH WOULD BE A FRAUD ON THE AGENT'S PART AND WHICH STIPCICH, BY EITHER FAILING TO READ THE POLICY OR, HAVING READ IT, FAILING TO OBJECT TO THE OMISSION, ADOPTED BY HIS SILENCE.

In the former case, (A), he would be violating his obligation as decided by this Court in the cases already cited, and in the latter case, (B), he would be violating his obligation as decided in the cases of *New York Life Insurance Co. v. Fletcher,* 117 U. S. 519, and *Mutual Life Insurance Co. v. Hilton Green,* 241 U. S. 613.

In the case of *New York Life Insurance Company v. Fletcher,* 117 U. S. 519, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these repre-

sentations were but a mere formality and had inserted false answers in the application.

This Court said (p. 529):

> "It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent contract of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. * * *"

The Court further says (p. 534):

> "There is another view of this case equally fatal to a recovery; *assuming that the answers of the assured were falsified, as alleged, the fact would at once be disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.*
>
> "The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further

with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated; a doctrine without authority and wholly indefensible. *No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctifying it.*"

In the case of

Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, at page 623,

Mr. Justice McReynolds said:

"The assured at the least consciously permitted an application containing material misrepresentations to be presented by subordinate agents to officers of the insurance company under circumstances which he knew negatived any probability that the actual facts would be revealed; and later he accepted policies which he must have understood were issued in reliance upon statements both false and material. He could claim nothing because of such information in the keeping of unfaithful subordinates. *Moreover, the false representations accompanied and were essential parts of the policies finally accepted. He did not repudiate, and therefore adopted and approved, the representations upon which they were based. Beyond doubt an applicant for insurance should exercise toward the company the same good faith which may be rightly demanded of it. The relationship demands fair dealing by both parties.* New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 529, 533, 534, 29 L. ed. 934, 939, 940, 6 Sup. Ct. Rep. 837; Northern Assur. Co. v. Grand View Bldg. Asso., 183 U. S. 308, 361, 46 L. ed. 213, 234, 22 Sup. Ct. Rep. 133; United States L. Ins. Co. v. Smith, 34 C. C. A. 506, 92 Fed. 503.

> Considered with proper understanding of the law, there is no evidence to support a verdict, against petitioner, and the trial court should have directed one in its favor."

There is, as we see it, under the foregoing authorities, no escape from the conclusion that Stipcich, by accepting the policy, either confirmed his own act in himself concealing his changed condition, or confirmed the act of the soliciting agent Coblentz in failing to transmit the information to the defendant Insurance Company. In the one event he himself perpetrated a fraud on the defendant Insurance Company; in the other, he confirmed, adopted, and approved the fraud perpetrated both upon himself and upon the Insurance Company by the agent Coblentz.

FIFTH.

AN INSURER HAS THE RIGHT TO LIMIT ITS AGENTS' AUTHORITY AND TO PROVIDE THAT THE KNOWLEDGE OF THE SOLICITING AGENT CONCERNING MATTERS MATERIAL TO THE RISK SHALL NOT BE IMPUTED TO THE PRINCIPAL.

But the defendant Insurance Company goes further. It stipulates that the knowledge of its agents shall *not be its knowledge*. That such a limitation is as a matter of law reasonable, we shall soon see; but that it is reasonable as a matter of fact also has been held by this Court.

Northern Assurance Co. v. Grand View Building Ass., 183 U. S. 308, 364,

where the Court says:

> "Besides the importance of such considerations to the parties immediately concerned in business

> transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The practical importance of this principle (and that all matters pertaining to the contract be contained therein) is emphasized by the fact (off the record) that defendant Insurance Company had on December 31, 1927, forty million one hundred sixty-six thousand one hundred seven (40,166,107) policies of life insurance in force. It can rely only on written statements made to it and incorporated in the policy when issued; and the good faith and co-operation of its policyholders is absolutely essential to its fair and impartial service to its policyholders. Local laws and regulations often overlook that the interests of these forty million policies are paramount to the supposed interests of a small few who would perhaps take advantage of the rest. The Insurance Company must by adequate limitation protect these forty million policies from the fraud and carelessness of the few and from the occasional acts of its own agents.

The policy as delivered to and accepted by Stipcich contained the following (T. 12):

> "This policy (and the application therefor) constitutes the entire contract between the parties."

The application provided (T. 28):

> "2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting *any benefits* under any policy issued hereunder.
>
> 3. That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the knowledge of the Company unless stated in either part A or B of this application."

The policy and application spoke as of the date of its delivery to and acceptance by Stipcich.

The application did not speak as of the 17th of February, the day it was filled out by Coblentz (T. 29), or the 18th of February, the day he appeared before the medical examiner (T. 36); it spoke as of the date the contract was consummated, about March 29th, and as delivered to and received by Stipcich. The policy itself stipulated that no information to or knowledge of Coblentz or any other agent was binding upon the defendant Insurance Company, unless contained in the application; so that it could be thereby made an integral part of the contract and so that the contract could speak the entire intent and obligation of the parties.

That such a limitation of authority is valid is now undoubted under the decisions of this Court.

In the case of *New York Life Insurance Company v. Fletcher,* 117 U. S. 519, the action was upon a policy of life insurance in the sum of $10,000. The insured in his application made certain representations concerning his health and physical condition which were untrue and material to the risk. The beneficiary pleaded and proved that the soliciting agents of the insurer knew of the true condition of the insured and the falsity of the representations and that they had advised the insured that these representations were but a mere formality and had inserted false answers in the application.

The application, however, provided that:

> "No statements or representations made or information given to a person soliciting or taking the application of the policy, shall be binding on the company or in any manner affect its rights unless they are reduced to writing and presented at the home office with the application."

This Court said (p. 529):

> "It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent contract of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith,

justice would require that the contract be canceled and the premiums returned. * * *

If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. *The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.*"

The Court went on to say (p. 531):

"The present case is very different from *Ins. Co. v. Wilkinson,* 13 Wall. 222 (80 U. S. bk. 20, L. ed. 617), and from *Ins. Co. v. Mahone,* 21 Wall. 152 (88 U. S. bk. 22, L. ed. 593). In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. *Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.*"

The opinion of this Court in the case of *Northern Assurance Co. v. Grand View Building Association,*

183 U. S. 308, crystallizes the law upon the subject. That case involved a policy of fire insurance which provided (p. 311) that it should be void if the insured had other insurance on the property covered thereby. The plaintiff (insured) did have other insurance, but claimed that the insurer's agent had been informed of the fact, and pleaded a waiver and estoppel to set up the fact of other insurance in defense of the action upon the policy. *The policy further provided* (p. 312) *that no officer or agent had the power to waive any of the conditions or provisions except and unless endorsed on the policy.*

The Court reviews the cases on the subject and announces the principles applicable (p. 361):

> "They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; *that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered;* that where fire insurance policies contain provisions whereby agents may, by

writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown, either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

The Court then applies the principles to the case then before it, saying (p. 363):

"It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in other company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. *In other words, the contention is that an agent with no authority to*

dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured."

The Court concludes the opinion by stating (p. 364):

"Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. *It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony.* Increased importance should be given to the rules involved in this discussion by that fact that, in latter times and in most, if not all, of the states, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy."

The case of the *Aetna Life Insurance Co. v. Moore,* 231 U. S. 543, is to the same effect. The insured, one Salgue, applied to the Aetna Life Insurance Company for a policy on his life. The policy provided, among other things:

"No agent or other person not an executive officer can waive any of the conditions of this policy, nor make any agreement binding upon said company."

The insured represented himself in good health, but was, in fact, found to be afflicted with heart

disease, and upon this ground the insurer resisted payment of the policy. Plaintiff claimed, however, that Salgue had correctly informed the medical examiner of his condition.

The Court says (pp. 559-560):

"It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, he will be regarded in so doing as the agent of the company, and not the agent of the insured. Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German-American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.

There are, however, later cases which enforce the provisions of a policy, and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof'. And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.

The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by Northern Assur. Co.

v. Grand View Building Asso., 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso., 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

The statute of Oregon, relied upon by plaintiff in error, is not in conflict with these principles. It does not purport to define the powers of the agent nor restrict the Insurance Company from limiting those powers. It provides:

> "Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded the agent of the company issuing the policy and not the agent of the insured. * * *"

Defendant Insurance Company admits, regardless of the statute, that Coblentz was its agent for the solicitation of the application for and delivery of the policy.

This Court has already determined in the case of *Mutual Life Insurance Co. v. Hilton Green*, 241 U. S. 613, at page 622, that such a statute does not purport to define the authority or enlarge the power of the agent. This Court there says:

> "The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an innocent third party may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does not apply when the third party knows there is no foundation for the ordinary presumption,—when he is acquainted with circumstances plainly indicating that the agent will not advise his prin-

cipal. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealing. Distilled Spirits (Harrington v. United States), 11 Wall. 356, 367, 20 L. ed. 167, 171; American Surety Co. v. Pauly, 170 U. S. 133, 156, 42 L. ed. 977, 985, 18 Sup. Ct. Rep. 552; American Natl. Bank v. Miller, 229 U. S. 517, 521, 522, 57 L. ed. 1310, 1312, 1313, 33 Sup. Ct. Rep. 883; Mechem, Agency, 2d ed., § 1815.

Section 2765 of the Florida statutes, supra, undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and the third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power. We assume Hogue, Torrey, and the medical examiners were in fact designated agents of the company, with power to bind it within their apparent authority; and in such circumstances the statute does not affect their true relationship to the parties. (Italics ours.) See Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 310, 33 L. ed. 341, 343, 10 Sup. Ct. Rep. 87; New York L. Ins. Co. v. Russell, 23 C. C. A. 43, 40 U. S. App. 530, 77 Fed. 94, 103; Wood v. Firemen's F. Ins. Co., 126 Mass. 316, 319; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 234, 235, 37 L. R. A. 131, 70 N. W. 84."

See also:

Hartford Fire Ins. Co. v. Nance, 12 Fed. (2d) 575;

Hartford Fire Ins. Co. v. Jones, 15 Fed. (2d) 1.

That such a statute does not and cannot alter the rule is shown in *Aetna Life Insurance Co. v. Moore*, 231 U. S. 543. This Court there considered the effect of a limitation upon the authority of the agent (like

the statute), *considering him as the agent of the company and not of the insured,* and holds such limitation proper and binding.

The Court says at pages 558-559:

> "It is therefore further contended that the case comes within the principle of the cases which establish that where the agent of the company prepares the application or makes representations to the insured as to the character and effect of the statements of the application, *he will be regarded in so doing as the agent of the company, and not the agent of the insured.* Among the cases cited to sustain the principle are the following in this court: Union Mut. L. Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. ed. 617; American L. Ins. Co. v. Mahone, 21 Wall. 152, 22 L. ed. 593; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341, 10 Sup. Ct. Rep. 87; German-American Mut. Life Asso. v. Farley, supra, is also cited, and being a Georgia case, its authority is especially urged.
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> *There are, however, later cases which enforce the provisions of a policy,* and we have seen that it was agreed in the policy under review 'that no statement or declaration made to any agent, examiner, or other person, and not contained in' the application, should 'be taken or construed as having been made to or brought to the notice or knowledge of' the company, 'or as charging it with any liability by reason thereof'. And he, Salgue, expressed his understanding to be that the company or one or more of its executive officers, and no other person, could grant insurance or make any agreement binding upon the company.
>
> *The competency of applicants for insurance to make such agreements, and that they are binding when made, is decided by* Northern Assur. Co. v. Grand View Building Asso., 183 U. S. 308, 46

L. ed. 213, 22 Sup. Ct. Rep. 133; Northern Assur. Co. v. Grand View Bldg. Asso., 203 U. S. 106, 51 L. ed. 109, 27 Sup. Ct. Rep. 27; Penman v. St. Paul F. & M. Ins. Co., 216 U. S. 311, 54 L. ed. 493, 30 Sup. Ct. Rep. 312."

Here Stipcich, having knowledge or at least suspicions that all is not well with him, makes out and signs an application for insurance without disclosing his condition or his suspicions. He then, the following day, receives medical confirmation of his knowledge or suspicion and relates it to the agent. Is not the position of the insurer in such case the same as if the agent's knowledge is acquired anterior to or contemporaneously with the application?

That is exactly what happened in this case. Stipcich knew on the Saturday preceding that his stomach was troubling him again. He concealed this information from the agent—this in itself constituting misrepresentation—then subsequently, he went to his physician and received confirmation of his suspicions that in all probability his ulcer had returned. He had further examination, an operation, and died. So far as the insurer is concerned, the effect of these circumstances upon its action upon the application is exactly the same as if Coblentz, the soliciting agent, had the information prior to the making of the application, and it was not disclosed in the application. In other words, the position of the insurer is the same whether the information came to the agent before or after the date of the application; and the stipulations of the application should be given the same weight and effect. When the reason is the same the rule should be the same.

The application and the representations therein must speak as of the date of the consummation of the policy and must then be true. If it is not true then it is the duty of the applicant to reject it as not stating the entire contract of the parties. Nothing less will satisfy the requirements of good faith, honest dealing and legal relations.

Dated, San Francisco,
February 20, 1928.

Respectfully submitted,
F. ELDRED BOLAND,
SAMUEL KNIGHT,
Attorneys for Defendant in Error.